

No. 14,146

IN THE

United States Court of Appeals
For the Ninth Circuit

JEW SING,

Appellant,

vs.

BRUCE G. BARBER, District Director,
Immigration and Naturalization
Service, San Francisco District,

Appellee.

BRIEF FOR APPELLEE.

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On the Brief.

FILED

JUN - 2 1954

PAUL P. O'BRIEN
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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The appellant is a native and citizen of China who first entered the United States in 1921 and who departed from the United States for a visit to China in 1947. Upon his return to the United States on October 14, 1947, he applied for admission as a native-born United States citizen. He was accorded a hearing before a Board of Special Inquiry and was excluded from the United States on the ground that he was not a native-born citizen of the United States but was an alien immigrant not in possession of a valid immigration visa.

In September 1953 the appellant filed an application for a stay of deportation under the provisions of 8 C.F.R. 243.3(h) (8 U.S.C.A. 1253(h)), alleging that deportation to China would subject him to physical persecution. The appellant was advised by the Immigration and Naturalization Service that Section 243(h) did not apply to his case, and he was informed that if he failed to depart from the United States he would be ordered deported.

When appellant was taken into custody for deportation proceedings, he petitioned for a writ of habeas corpus. The petition was denied by United States District Judge Goodman because it did not state facts sufficient to warrant the writ. This is an appeal from the order of the District Court.

STATUTE INVOLVED.

Section 243(h), Immigration and Nationality Act (8 U.S.C.A. 1253(h)):

“The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.”

ARGUMENT.

The appellant does not challenge the validity of the deportation order. He is concerned only with the application for *stay of deportation* and states that the issues involved in this appeal are:

1. The refusal of the Immigration and Naturalization Service to give any consideration to the petition filed by the appellant seeking a stay of deportation on physical persecution grounds was contrary to law.

2. The action of the Service was based on an erroneous interpretation of the statute.

3. The appellant is entitled to the relief afforded by the provisions of 8 U.S.C.A. 1253(h).

The appellee declined to consider an application for a stay of deportation under Section 1253(h) for the sole reason that the appellant was an *excluded* alien. It is the view of the Immigration and Naturalization Service that 8 U.S.C.A. 1253(h) applies only to aliens within the United States against whom *expulsion* deportation proceedings are instituted. Thus, the sole issue in this appeal is whether the appellant, an *excluded* alien, is entitled to have his application for a stay of deportation under the provisions of Section 1253(h) entertained by the Immigration and Naturalization Service.

We agree with appellant that habeas corpus is the proper method of judicial review of deportation orders, either exclusion or expulsion, but appellant herein does not seek review of the deportation order.

Appellant contends that deportation includes exclusion. It is true that the word "deportation" is applied to both exclusion and expulsion proceedings. However, there is a time-honored distinction between expulsion by arrest and deportation and exclusion deportation. The provisions of Section 18 of the Immigration Act of 1917 (8 U.S.C.A. 154) as related to exclusion were, with some modification, restated in Section 237 of the Immigration and Nationality Act (8 U.S.C.A. 1227). The provisions of the same Act as related to arrest and deportation of aliens (expulsion), Section 20 of the Immigration Act of 1917 (8 U.S.C.A. 156), were restated with some changes in Section 243 of the Immigration and Nationality Act (8 U.S.C.A. 1253). It is submitted that under the Immigration and Nationality Act, as in prior legislation, there have been two distinct classes of deportation proceedings: One relating to the alien whose application for admission to the United States is denied. Such alien is excluded and deported. The second relating to the alien *in* the United States who is arrested and deported after *expulsion* proceedings.

The provisions for stay of deportation on the grounds of physical persecution are included in Section 243. This section is concerned only with arrest and deportation (expulsion) of aliens. The beginning of the first sentence of Section 243, "The deportation of an alien *in the United States* * * *" clearly identifies the alien to whom it is applicable.

It is well established that an alien excluded from admission is not *in* the United States, but is in the status of having been stopped at the border.

Shaughnessy v. Mezei, 345 U.S. 206;

Ekiu v. United States, 142 U.S. 651;

United States v. Ju Toy, 198 U.S. 253;

Kaplan v. Tod, 267 U.S. 228;

Suey v. Spar, 149 F. 2d 881;

Pantano v. Corsi, 65 F. 2d 322;

Stoma v. Commissioner of Immigration at New Orleans, 18 F. 2d 576.

Appellant contends that he is being deported under the provisions of 8 U.S.C.A. 1253 in that Section 237 (8 U.S.C.A. 1227) cannot apply to his case because it applies only to exclusions under “*this Act*” (Immigration and Nationality Act of 1952) and not the Immigration Act of 1917, under which appellant was excluded. Appellant asserts that Section 243 is applicable because it provides for deportation of aliens under this Act *or any other Act*. Section 243 applies to aliens *in the United States* who are arrested and deported (expulsed) under the Immigration and Nationality Act of 1952 or any prior Act, but has no relation to the exclusion of aliens and consequent deportation under the immigration laws. This appellant was excluded under the provisions of the Act of 1917.

Section 405(a) of the Immigration and Nationality Act (footnote to 8 U.S.C. 1101) provides:

“Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, *order of exclusion*, or other document or proceeding which shall be valid at the time this Act shall take effect * * *.” (Emphasis ours.)

The exclusion order under the 1917 Act is still valid by virtue of the provisions of Section 405(a), and the appellee proposes to deport the appellant under its authority. It is submitted that the appellant is not an alien “in the United States” within the meaning of Section 243 of the Immigration and Nationality Act. He is therefore not entitled to make application for a stay of deportation under the provisions of Section 243(h) (8 U.S.C.A. 1253(h)). The decision of the court below should be affirmed.

Dated, San Francisco, California,

May 26, 1954.

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